In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-818

R. D. FITCH, ET AL.,

Appellants

VS.

HIJINIO SILVA, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

APPELLEES' MOTION TO AFFIRM THE TRIAL COURT JUDGMENT

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NO. 76-818

R. D. FITCH, Individually and in His Official Capacity as Frio County, Texas, County Judge; WILLIAM A. BOYD, JAMES C. STACY, and OWEN LESTER, Individually and in Their Official Capacities as County Commissioners of Frio County, Texas; MONA HOYLE, Individually and in Her Official Capacity as Frio County, Texas, County Clerk; BENNY C. SANDERS, Individually and His Official Capacity as Sheriff of Frio County, Texas; YANCEY BARNHART, Individually and in His Official Capacity as Democratic Party Chairman of Frio County, Texas; and FRIO COUNTY, TEXAS

Appellants

VS.

HIJINIO SILVA, CARMELINA TREVINO, ARNALDO HERNANDEZ, MODESTA SALAZAR, ANITA GARZA, NOEL PEREZ and RUDY GONZALES,

Appellees

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APPELLEES' MOTION TO AFFIRM THE TRIAL COURT JUDGMENT

COME NOW Appellees in this appeal and move the United States Supreme Court to affirm the trial court Order entered on September 26, 1976, and the final judgment entry of

October 5, 1976. This Motion is based upon the accompanying Memorandum of Points and Authorities In Support of the Motion to Affirm.

Dated: January

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF APPELLEES' MOTION TO AFFIRM

Appellees are filing this Motion to affirm the lower court judgment and orders, pursuant to Rule 16, 1(c) of the Rules of the Supreme Court on the grounds that the "questions on

which the decision of the cause depends are so unsubstantial as not to need further argument." Appellees are not challenging the jurisdiction of this Court since an appeal from a final judgment of a duly constituted Three Judge Court lies to the United States Supreme Court. 28 U.S.C. § 1253; 42 U.S.C. § 1973c. Since the Statement of the Case as presented by the Appellants in this case is incomplete, a more fully developed discussion is presented below.

STATEMENT OF CASE

Appellees filed this action in the United States District Court for the Western District of Texas to enforce the statutory protections afforded by the Voting Rights Act of 1965, as amended in 1975. 42 U.S.C. § 1973 *et. seq.* Section 5 of the Act, 42 U.S.C. §1973c requires all covered jurisdictions in Texas to submit all post November 1, 1972 changes in voting procedures and practices to the United States Attorney General or the United States District Court for the District of Columbia for a determination that the proposed change in voting procedure does not have a discriminatory purpose or effect and does not discriminate against persons because of their membership in a language minority group.

As this Court clearly outlined, actions to *enforce* the provisions of the Voting Rights Act may be maintained in any covered jurisdiction where venue is proper. *Allen v. State Bd. of Elections,* 393 U.S. 544, 89 S.Ct. 817, 22 L. Ed. 2d 1 (1969). However any substantive Section 5 determination can only be made in the United States District Court for the District of Columbia, or by the United States Attorney General whose offices are located in Washington, D.C. In filing this cause of action, *Appellees* merely sought to enforce the provisions of the Voting Rights Act and not to review any

substantive determinations made by the United States Attorney General pursuant to Section 5 of the Act. Thus the factual adjudication required of the Three Judge District Court can be summarized as follows:

1) Is the political subdivision a Section 5 covered jurisdiction.

2) Was there a change in voting procedure enacted after November 1, 1972.

3) Has the change in voting procedure been precleared by the United States Attorney General or the United States District Court for the District of Columbia.

These factual adjudication were directly applicable to the case at bar. Frio County, Texas is a political subdivision subject to Section 5 of the Voting Rights Act of 1965, as amended in 1975. 40 Fed. Register No. 185, at 43746 (Sept. 23, 1975). On July 13, 1973, the Frio County Commissioners' Court reapportioned the Commissioner Precincts. Plaintiffs' Exhibit A, September 2, 1976 Trial. These Commissioner Precincts are the election districts for the offices of County Commissioner, Constable, and Justice of the Peace. Although Frio County was notified of its obligation pursuant to Section 5 to preclear this change in voting procedure on August 25, 1975 and on November 26, 1975, Plaintiffs' Exhibits B, C, September 2, 1976 Trial, Frio County did not submit the reapportionment plan to the Department of Justice until February 17, 1976. On April 16, 1976, the Department filed an objection to the proposed change in voting procedure. Plaintiffs' Exhibit D, September 2, 1976

Trial. Despite the objection interposed by the Department of Justice, Frio County intended to conduct the May 1, 1976 primary elections pursuant to the objectionable 1973 reapportionment plan. Stipulation of Fact No. 15, September 2, 1976 Trial. Thus Appellees filed this lawsuit seeking to enforce federal law.

After securing on April 28, 1976 a Temporary Restraining Order enjoining the May 1, 1976 primary elections, the Appellees and the Frio County Commissioners Court entered into extensive negotiations to reformulate a reapportionment plan and draft an order which could possibly form the basis of an agreed order. The evidence produced at the September 2, 1976 trial, indicates that "during the negotiations between the plaintiffs [Appellees] and defendants [Appellants] in this action, the plaintiffs adopted all of the defendants' suggestions into the final terms of the June 28, 1976 Court Order." Stipulation of Fact No. 44, September 2, 1976 Trial. These changes included adoption of their requests to preserve incumbency, the inclusion of the Courthouse in Commissioner Precinct No. One (1), the negotiation of attorney fees, changes in the wording of Paragraph 12 of the June 28, 1976 Order, the inclusion of a six month residency period, the deletion of an objectionable absentee ballot provision, and the incorporation of an election schedule proposed by the Appellants.

After agreeing to the terms of the proposed Order, this Order was signed by the legal representatives of both parties and filed by the Three Judge Court on July 6, 1976 and entered nunc pro tunc as of June 28, 1976. Order of June 28, 1976. Subsequently thereafter, the Appellants released their first counsel and hired Mr. Harvey L. Hardy to set aside the agreed Order. The basis for seeking to set aside the Order

are the same grounds advanced by Appellants in this Appeal. The July 6, 1976 Court Order entered nunc pro tunc as of June 28, 1976 was vacated without a hearing by the Three Judge Panel on August 5, 1976. Order of August 5, 1976. In order to preserve the integrity of the election process established by the July 6, 1976 Court Order, the convening judge granted an additional Order on August 13, 1976, extending the terms of the election schedule until the September 2, 1976 trial.

At the September 2, 1976 trial, the Three Judge Panel concluded that the reapportionment plan and the election schedule established by the July 6, 1976 Court Order, entered nunc pro tunc as of June 28,1976, should be reinstated. September 26, 1976 Court Order. It is the reinstatement of this agreed Order which Appellants now seek to challenge. Appellants contend that the Three Judge Panel abused its discretion in reinstating the terms of the agreed Order. Appellees will address each of the points raised by Appellants in their appeal.

I. Failure To Have A Trial On The Merits

Appellants have confused this cause of action seeking to enforce the provisions of the Voting Rights Act with a Section 5 substantive judicial determination which can only be instituted in the United States District Court for the District of Columbia. Appellants are seeking a "hearing in this case on the merits of the reapportionment of Frio County...." Appellants' Jurisdictional Statement at 6. As previously indicated a trial in an enforcement proceeding involving the Voting Rights Act is confined to a limited inquiry. The Three Judge Panel in the Western District of Texas had no jurisdiction to evaluate the merits of any reapportionment plan.

Instead of instituting a lawsuit in the District of Columbia, the Appellants decided to negotiate a settlement. This settlement was authorized by the County Commissioners Court. After the settlement had been filed, the Appellants decided to invalidate the agreed Order. Although the Appellants claimed misrepresentation and fraud on the part of the first Special Attorney, the convening Judge aptly noted, "It just seems to me as if there's been a change of minds on the part of the Commissioners' Court," Transcript at 84, August 13, 1976 hearing. There was a full trial on the merits to determine whether the agreed Order should be reinstated on September 2, 1976.

The "trial on the merits" which occurred on September 2, 1976 was initially limited to determine whether the 1973 reapportionment should be enforced. After resolving this issue in favor of Appellees, the Three Judge Panel then focused on the issue of whether to reinstate the terms of the previously entered agreed Order. Thus the Appellants had their "trial on the merits" for those issues which could properly be considered by the Three Judge Panel. There is no denial of due process under these circumstances.

II. The Trial Court Did Not Abuse Its Discretion

Whenever a lawsuit is instituted against a county in Texas it is the responsibility of the County Commissioners' Court to defend the action. The County Commmissioners' Court to defend the action. The County Commissioners' Court, which is comprised of a County Judge and four elected members, upon the agreement of any three members, Texas Vernon's Ann. Civ. Statute Art. 2343, have the authority to settle a lawsuit filed against the County. *O'Quinn v. McVicker*, 428 S.W. 2d 111, 112 (Civ. App. Tex. 1968) ("Such Commission-

ers Court has authority to cause suits to be instituted or defended in the name of and for the benefit of the county....") Other officials cannot determine whether a lawsuit filed against a county will be settled, particularly the County Clerk, the Sheriff and the Democratic Party Chairman. Thus, their opposition to a proposed settlement is without legal significance.

These "other" officials were added to the lawsuit merely as nominal parties to effectuate any relief granted by the Three Judge Court. As pointed out by Appellants, these officials are part of the county election board. Appellants' Jurisdictional Statement at 7. Any Court relief requiring the institution of a new election schedule will necessarily affect the duties of these election board officials. Since they will be required to perform functions in conducting a new election, these officials had to be made subject to the equitable relief granted. If this were a damage action different considerations would apply. However, in an equitable proceeding where an Order requires the performance of specific duties mandated by law, the officials responsible for the performance of these duties will by definition have to be named in the Order. For these reasons, the Sheriff, the County Clerk, and Party Chairman were added as parties.

Appellants also contend that the Special Attorney misrepresented the law to the Commissioners Court. If the law had not been misrepresented, there would not have been the necessary quorum to settle the lawsuit. However, the Three Judge Court listened to the testimony of the Appellant Commissioners claiming fraud and found those contentions specious at best. The Appellant Commissioners advanced two contentions. First, they asserted that the Special Attorney advised the Commissioners' Court of their inability to re-

apportion until 1981. However, when examined in its proper perspective the advice is legally sound. The Special Attorney gave this advice in describing the various alternatives to the Commissioners' Court. One alternative was to go to trial and possibly have the Court institute a reapportionment plan. Once the Court ordered plan was in effect, ". . .another reapportionment by the Commissioners' Court prior to the new census would be inviting contempt of Court and would be inviting another lawsuit by the Plaintiffs...." Transcript at 11, September 2, 1976 Trial. In any event, the Three Judge Panel chose to believe the Special Attorney and rejected Appellants' contention.

The second allegation of misrepresentation concerned the explanation of the *Beer* case. *Beer v. U.S.*, U.S. , 96 S. Ct. 1357, L. Ed. 2d (1976). According to the Appellants, the Special Counsel failed to inform the Commissioners' Court that the District Court decision in *Beer* had been reversed. Although the Special Attorney was not aware of this reversal, he indicated that his advice was not predicated upon the *Beer* holding. Transcript at 10, September 2, 1976 Hearing. Since there was a constitutional claim of malapportionment which could be raised, the Special Attorney advised his clients that it was highly disadvantageous to await a court-ordered reapportionment plan. Instead of engaging in protracted litigation, the avenue of settlement was the most reasonable course to follow.

Not all of the Commissioners' Court chose to abide by the Special Attorney's advice. As noted by the Appellants, two of the County Commissioners did not vote in favor of settlement. Appellants' Jurisdictional Statement at 7. This negative vote by these two Commissioners further discredited the testimony of the Appellant Commissioners who now claim

that they were misled. At all times, the Commissioners' Court could have instituted a Section 5 proceeding in the United States District Court for the District of Columbia to seek a reversal of the U. S. Attorney General's letter of objection. The Commissioners' Court, however, chose to settle Since the Three Judge Panel did not find any fraud or misrepresentation, the Court reinstated the terms of the July 6, 1976 Court Order, entered *nunc pro tunc* as of June 28, 1976.

Appellants other contentions concerning the lack of authority of the Special Attorney to negotiate on behalf of the Sheriff, County Clerk, and Democratic Party Chairman, and the failure to secure consent from these officials to the agreed Order are equally without merit. As to the lack of authority to represent these officials, Appellees maintain that an attorney-client relationship existed as early as April 28, 1976. Transcript at 2, April 28, 1976 Hearing. In the April 28, 1976 hearing, the Special Attorney announced that he represented the Sheriff, County Clerk, and the Democratic Party Chairman. This relationship continued until the Special Attorney was formally released from his duties. Moreover, at all times, these officials could have retained counsel to represent their interests, if any, during the negotiations which resulted in the entry of the Consent Decree. Since these officials failed to notify the Court or the Appellees' attorneys of their desire to terminate the services of the Special Attorney, they should now be estopped from denying the existence of this attorney-client relationship.

With respect to their lack of consent, Appellees have previously indicated that only the Commissioners' Court can defend and settle a lawsuit. Even if the Supreme Court determines that their consent was necessary, the participation of

these Appellants in the negotiating process certainly supported the Three Judge Panel's rejection of this contention. As noted in Stipulation of Fact Number 44, September 2, 1976, Trial, ". . .during the negotiations between the plaintiffs and defendants in this action, the plaintiffs adopted all of the defendants' suggestions into the final terms of the June 28, 1976 Court Order." These suggestions included a proposed election schedule submitted by the County Clerk and the Democratic Party Chairman, Stipulation of Fact No. 42, September 2, 1976 Trial, officials who now contend they never acquiesced to the terms of the agreed Order. In the final analysis, the evidence simply does not support the Appellants contentions.

In view of this presentation, the instant appeal only presents the question of whether the Three Judge Panel abused its discretion in reinstating the terms of the agreed Order. The evidence adduced in the proceedings below clearly does not justify reversing the Judgment reinstating the agreed Order. Since the Appellants have not sought any Section 5 review in the United States District Court for the District of Columbia, the only remaining questions for consideration on appeal are so unsubstantial as not to need further argument.

Dated: January Respectfully submitted,

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PROOF OF SERVICE

I certify that on this the 21st day of January,1977 copies of the Appellees' Motion To Affirm The Trial Court Judgment and Memorandum Of Points and Authorities In Support of Appellees' Motion To Affirm were sent to the following attorneys of record for Appellants:

Harvey L. Hardy, Esq.
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San Antonio, Texas 78209

James W. Smith, Jr.
Frio County Attorney
P. O. Box V
Pearsall, Texas 78061

by depositing same in the United States Post Office with proper postage affixed thereto.

All parties required to be served have been served.

Dated: January

_____